

The Administrative Law Judge (ALJ) determined claimant suffered a compensable work-related injury and was not engaged in horseplay at the time of the accident. The ALJ

further determined claimant was a full-time employee on the date of the accident and that his permanent partial disability was limited to the foot. Consequently, the ALJ awarded the claimant a 28 percent permanent partial functional impairment to the foot.

The respondent raised the following issues on review: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) claimant's average weekly wage; and, (3) nature and extent of disability. Respondent contends the claimant's injury arose out of horseplay and therefore is not compensable. If claimant's injuries are compensable, the respondent requests the Board to affirm the ALJ's 28 percent permanent partial disability to the right foot. Respondent further contends the claimant was a part-time employee and his average weekly wage should be \$69.53 per week based upon 13.5 hours worked per week at \$5.15 per hour.

The sole issue raised on review by the claimant is the nature and extent of disability. Claimant argues the evidence supports a finding of a 10 percent permanent partial functional impairment to the whole person. The claimant requests the Board to affirm the ALJ's Award in all other respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board affirms the ALJ's Award.

On June 16, 2000, claimant injured both feet when they were run over by a fork lift. Claimant was trying to get some gloves off the back of a fork lift when it backed up over his feet. Specifically, it backed up over his right midfoot and his left forefoot. He sustained an open fracture dislocation of his right forefoot and superficial injuries to his left foot.

At about 4:45 p.m. on June 16, 2000, claimant went up to the fork lift, got his gloves and was talking to the fork lift driver, Morgan, about a delivery. Claimant started to walk away and the last thing he remembers is being on the ground. The fork lift had dragged the claimant approximately 10 feet. Claimant was facing the fork lift and was laying on his back when the fork lift stopped. The fork lift's back wheel had run over or pinned the claimant's feet.

Claimant denied that he was attempting to jump on the fork lift while it was moving or that he was walking with his back to the fork lift while it was turning around. The fork lift driver, Morgan Michaud, denies seeing or talking with claimant immediately before the accident. But Mr. Michaud did testify that claimant had previously inquired about his gloves.

Ryan Liby, a co-worker, testified that he saw claimant with his back to the fork lift and it appeared claimant was attempting to get on the fork lift. Mr. Liby's description of the

incident is not particularly persuasive as it placed claimant within inches to the immediate right of Mr. Michaud who did not see claimant. The Board also notes the inconsistencies in the statements that Mr. Liby provided the insurance investigator and Mr. Liby's sworn testimony.

The claimant's version of events is supported by the surgeon who operated on claimant, Dr. Allan D. Holiday, who obtained a history on the date of the accident that also indicates that the fork lift ran over claimant's feet while he was trying to get his gloves. Dr. Holiday's history, which is set forth in the record entitled "History & Physical" from Mercy Health Center, reads in pertinent part:

The patient is a very pleasant 17-year-old boy who lives in Clay Center, Kansas. He works at Fullerton [sic] Lumber Company. He reports he was trying to get some gloves off the back of a fork lift when it backed up over his feet. Specifically it backed up over his right midfoot and his left forefoot. He sustained an obvious open fracture dislocation of his right forefoot and superficial injuries to his left foot.<sup>1</sup>

The Board finds claimant was not engaging in horseplay as he was retrieving his gloves when the accident occurred. The Board affirms the ALJ's determination claimant suffered accidental injury arising out of and in the course of his employment.

### **Nature and Extent of Disability**

Dr. Allan D. Holiday, a board certified orthopedic surgeon, first saw the claimant on June 16, 2000, in the emergency room with a fracture to his right foot. Dr. Holiday diagnosed the claimant with a crushed arch and dislocated bones of the right foot. The first treatment by Dr. Holiday included washing out and cleaning the wound as well as putting bones back into place. Several days later, the second treatment included surgery to place pins and screws as well as washing and cleaning the wound. The third treatment consisted of a skin graft over the wound and an adjustment made to the fracture. Later on, there was scar tissue and screws removed from the foot. Dr. Holiday testified the claimant's foot injury was very severe in that he almost lost his foot.

On June 14, 2001, because of claimant's complaints, Dr. Holiday examined claimant's left knee. He specifically determined there was no permanent pathology in the left knee and it did not require any permanent impairment.

On July 23, 2001, Dr. Holiday opined the claimant had reached maximum medical improvement (MMI) and he rendered an impairment rating. Based on the *AMA Guides*,<sup>2</sup>

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<sup>1</sup> Holiday Depo., Ex. 1.

<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

Dr. Holiday opined claimant fell into the category of severe foot deformity which results in a 28 percent impairment to the foot.

Dr. Sergio Delgado, board certified in general orthopedics, examined claimant on November 7, 2001, at the request of his attorney. Dr. Delgado noted in his physical evaluation that claimant had an obvious right leg limp. Dr. Delgado testified the claimant would need orthotics for the rest of his life. He also opined the claimant has chondromalacia of the left knee which the antalgic gait caused to become symptomatic. Based upon the *AMA Guides*, Dr. Delgado rated the claimant's right foot with a 28 percent impairment. Claimant's left lower extremity received a 5 percent impairment. The doctor combined the ratings for a 10 percent permanent partial functional impairment to the whole body.

But the doctor was not aware of the extent that claimant engaged in football, track and walking long distances while hunting and he agreed those events could be the causative factor of claimant's left knee complaints which did not appear in Dr. Holiday's medical notes until approximately June 14, 2001. The doctor testified:

Q. And without having more information about what exact activities he's engaging in, can you make a definitive conclusion as to the causative nature of the left knee complaint?

A. I would have the -- of course I rely on the history that he gave me, that the pain developed and he attributes it to limping, but it could have been caused by the athletic performances.<sup>3</sup>

Claimant argues that his left knee became symptomatic because of an antalgic gait from his right foot injury. Consequently, he argues he is entitled to Dr. Delgado's 10 percent impairment to the whole body.

The ALJ noted in his Award:

The claimant did not advise Dr. Delgado of his participation in track. Dr. Delgado observed the Claimant to be limping considerably, and to have considerable stiffness in the foot, conditions which were not observed by Dr. Holiday. Dr. Delgado testified that with the degree of stiffness he observed in November 2001 he would be surprised if the Claimant was not limping outside of his office. The videotapes of the Claimant's sports activities do not document the limping observed by Dr. Delgado, and Ms. Bently, a co-worker of the Claimant, testified that she no longer notices any limping by the Claimant. Dr. Delgado testified that the Claimant's participation in track could be the source of the left knee symptoms. Dr. Holiday

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<sup>3</sup> Delgado Depo. at 32-33.

testified that the Claimant might have some transient discomfort but he has no permanent impairment to the left knee.<sup>4</sup>

The ALJ concluded claimant did not meet his burden of proof to prove any left knee impairment and that even if claimant has some left knee impairment he did not meet his burden of proof that such impairment is attributable to his work-related accident. Consequently, the ALJ awarded claimant benefits for a 28 percent functional impairment to the foot. The Board agrees and affirms.

#### **Average Weekly Wage**

Respondent argues claimant's gross average weekly wage should be calculated based upon the statutory provisions for a part-time employee. It is undisputed that claimant was initially hired as a part-time employee during the school year. However, after school ended the claimant began working full-time 44 hours a week at \$5.15 an hour during the summer. He testified that was the number of hours he was working when injured.

K.S.A. 44-511(a)(4) and (5) provide in pertinent part:

(4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

Clearly during the school term claimant was expected to work less than 40 hours per week and was a part-time employee, however, during the summer months he was expected to work more than 40 hours per week and clearly meets the statutory definition of a full-time hourly employee. The Board affirms the ALJ's determination claimant was a full-time employee and the calculation of claimant's gross average weekly wage based upon that finding.

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<sup>4</sup> Award at 3.

**AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated June 26, 2002, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Jeff K. Cooper, Attorney for Claimant  
       Gary K. Albin, Attorney for Respondent  
       Bryce D. Benedict, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director